

JAMES T. FRIEDMAN

IBLA 78-567

Decided February 12, 1979

Appeal from decision of Townsite Trustee George F. M. Gustafson, Alaska State Office, Bureau of Land Management, rejecting application for trustee deed to townsite Lot 3, Block 18, Tract B, U.S. Survey 4498.

Vacated and remanded for hearing.

1. Alaska: Townsites—Hearings

Where there are conflicting applications for a lot in a native townsite and the evidence as to who has the better claim is vague and inconclusive, the townsite trustee should submit the matter for a hearing before an administrative law judge. 43 CFR 2565.4(b).

APPEARANCES: Paul Gaskin, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

James T. Friedman has appealed from the June 7, 1978, decision of George F. H. Gustafson, townsite trustee for the Alaska State Office, Bureau of Land Management (BLM). This decision rejected Friedman's application for a trustee deed to Lot 3, Block 19, Tract B, U.S. Survey 4498, in favor of a similar application by Conrad J. Morgan. These applications were made pursuant to the Act of May 25, 1926, 44 Stat. 629, 43 U.S.C. § 733 (repealed October 21, 1976, by section 703(a), Federal Land Policy and Management Act (FLPMA), 43 U.S.C.A. § 1701 note (West Supp. 1978)).

There are two versions of the factual background to the dispute. Friedman asserts that the lot was totally vacant prior to July 27, 1977, when he purchased lumber and had it delivered there. This assertion is corroborated by affidavits of several witnesses. He states that he returned to the lot on July 28, 1977, and found that his lumber had been removed and dumped off the lot across the adjoining roadway, and that Morgan had had lumber delivered there and was

proceeding to erect his own structure under the impression that he would be entitled to the lot if he finished it before Friedman finished his structure. Friedman apparently moved his lumber back on the lot and began to build a single dwelling there, allegedly for use as his residence. A copy of a letter submitted by Friedman indicates that on August 3, 1977, he notified Morgan that he had believed that the lot was devoid of materials when he delivered his lumber there on July 27, and that he regarded his claim as superior to Morgan's. On January 10, 1978, he filed his Alaska Townlot Deed Application, alleging use and occupancy of the lot since July 27, 1977.

Morgan relates a different story. He states that he began use and occupancy of the lot on June 30, 1977, when, as corroborated by witnesses, he secured a building permit, found his boundaries, and set stakes for batter boards. On July 4, 1977, again as corroborated by witnesses, he placed material on the lot and began ditching operations and building batter boards. He asserts that he told Friedman in June that he was going to begin building on the lot. Concerning Friedman's actions, Morgan states that Friedman entered the lot at an unspecified time and tore down his (Morgan's) first foundation, dumped his own (Friedman's) building material on the lot, and proceeded to build a deck there. On August 15, 1977, Morgan filed his deed application, alleging that he had used the lot since June 30, 1977, and that he had completed a storage building there.

The record contains a copy of a City of Kotzebue police service request which indicates that Morgan reported that, on August 1, 1977, an unidentified male tore down Morgan's building foundation and built another foundation with his own material without having a permit to do so. The record does not indicate that a police officer investigated the site or inquired into whether building permits for the lot had been issued. It is noted on the report that on October 24, 1977, the city manager "said to let them find out who will build the house first then win the title to the lot."

[1] In his decision denying Friedman's application and awarding the lot instead to Morgan, Townsite Trustee Gustafson noted that the evidence as to who held the better claim to the lot is vague. He stated that, in the absence of fruitful field examinations as to who had the better claim to the lot, he had placed "a lot of weight * * * on what the record shows." It is our view that the record is insufficient to support his conclusion that Morgan rather than Friedman is entitled to the lot and that he should have submitted the dispute for a hearing under 43 CFR 1850, as it involved conflicting applications. 43 CFR 2565.4(b). ^{1/} Further, it is impossible to determine from the

^{1/} While 43 CFR 2565.4(b) applies to conflicting applications for non-Native townsite lots, we have held that the regulations governing non-Native townsites apply to the disposition of Native townsite lands, to the extent that they do not vitiate the provisions of the Alaska

from the record how the townsite trustee arrived at his conclusion that Morgan, rather than Friedman, met the legal requirements to receive this lot. Accordingly his decision must be vacated, and the matter remanded for clarification. Nancy A. Delkittie, *supra* at 371.

The trustee relied on two facts in concluding that Morgan was the first to enter the lot: that Morgan had obtained a building permit from the City of Kotzebue on June 30, 1977, and that he had complained to the city police on August 1 that someone had torn down his building foundation on the lot. Neither fact is probative of the conclusion that Morgan was the first to enter the lot.

First, obtaining a building permit is merely a declaration of an intent to begin building and does not constitute an entry on the lot. Second, Morgan's report to the police that an unidentified man, presumably Friedman, had entered the lot and torn down his preliminary work there is of no value in resolving the factual dispute. As it is hearsay, it is possible that the report is false. Nothing in the report shows that police witnessed firsthand the conduct alleged therein or that they even saw its aftermath, e.g., the remains of the destroyed foundation. Further, even if true, the fact that Friedman pulled down Morgan's foundation does not mean that Morgan's version of the facts is correct, so that his claim would be superior to Friedman's, as the occurrence of such an incident comports with both versions of the facts in this dispute. According to Morgan, he began building his structure on July 4, and apparently on August 1, Friedman tore down this structure, dumped his material on the lot, and began building his own structure. Friedman claims to have dumped his material on the lot, which was vacant, on July 27, and that, on July 28, someone (presumably Morgan) removed this material and began to build another structure there. Under Friedman's version, there could have been an incident on August 1 in which Friedman tore down what Morgan had built on July 28 and afterwards in order to clear the lot to begin his own structure and in order to let Morgan know that he regarded his (Morgan's) claim to the lot as inferior to his own. Thus, we conclude that the trustee erred by awarding the lot to Morgan for the reasons cited in his decision.

There are several preliminary legal questions, the resolution of which on remand may obviate the need to resolve this factual dispute. First, the record contains information which suggests that both Friedman and Morgan have given up possession of the lot, thus raising the possibility that they have abandoned their claims to it. Friedman, in a letter dated January 1, 1978, to Trustee Gustafson,

fn. 1 (continued)

Native townsite law. Nancy A. Delkittie, 35 IBLA 370, 371 (1978); Leona R. Strang, 26 IBLA 144, 148 (1976); City of Klawock v. Andrew, 24 IBLA 85, 90 (1976); *aff'd*, City of Klawock v. Gustafson, Civ. No. K-74-2 (D. Alaska, filed Nov. 11, 1976).

indicated that he had lived in his house on the lot in question only until October 3, 1977, when he left Kotzebue to continue his training as an apprentice electrician in Prudhoe Bay. There is also an affidavit by Friedman that he attempted to locate Morgan in order to serve him with a copy of the notice of appeal in this matter, but that Morgan had moved away from the lot and left no forwarding address so that he (Friedman) was unable to locate him. On remand, the administrative law judge to whom this matter is assigned should determine whether either Friedman or Morgan, or each of them, has abandoned his claim to the lot. See Gordon v. Ross-Higgins Co., 162 Fed. 637 (9th Cir. 1908). Of course, if either party fails to respond to a notice of hearing after having been served at his last address of record, the matter would be properly resolved without his participating in the hearing. 43 CFR 4.22(d), 4.422(c)(2).

Moreover, as noted above, the statute authorizing the distribution of these lots, 43 U.S.C. § 733 (1970), was repealed by section 703(a) of FLPMA, 43 U.S.C.A. § 1701 note (West Supp. 1978). On remand, the administrative law judge should require BLM to submit what it regards as the present legal basis for the continued distribution of these lots under this section. 2/ Trustee Gustafson has apparently adopted a rule under which the conflicting applicant who is first to enter a lot is entitled to it. 3/ On remand, BLM should also establish the propriety of this rule and present into the record the criteria by which the townsite trustee determines who first enters the lot.

2/ Material submitted by the Regional Solicitor, Anchorage, Alaska, on January 13, 1978, to the State Director, BLM, states as follows:

"The townsite laws were extended to Alaska by Act of March 3, 1891 (26 Stat. 1099) as supplemented by Act of May 25, 1926 (44 Stat. 629). These laws and the regulations adopted to implement them provide that occupants of public lands could petition for townsite survey and the appointment of a Townsite Trustee. Upon survey and subdivision of the occupied lands, a federal patent would be issued to the Trustee and all occupants on the date of subdivisional survey would receive Trustee deeds to the lots they occupied. These laws were repealed by Act of October 21, 1976 (90 Stat. 2791). Some sixty townsites however were pending on the date of repeal and are in the process of being administered and closed out.

"Under the regulations which govern the execution of the trust certain land in some of the townsites is open to entry and settlement." (Emphasis supplied.)

BLM should specify what provisions of the townsite regulations have opened lots to entry and settlement.

3/ Trustee Gustafson advised Friedman in a letter dated August 15, 1977, as follows: "It is not a question of who is the first to complete a structure. Rather, it is based on who first enters the lot."

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the matter is referred for assignment for a hearing before an administrative law judge.

Edward W. Stuebing
Administrative Judge

We concur.

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

